No. 22,464

IN THE

United States Court of Appeals
For the Ninth Circuit

ELECTROMEC DESIGN AND DEVELOPMENT CO., INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR REVIEW AND CROSS-PETITION TO ENFORCE A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE PETITIONER

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Statutes

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JURISDICTION.

This case is before the Court upon petition of Electromec Design and Development Co., Inc., for review of a Decision and Order of the National Labor Relations Board issued on December 8, 1967, in Case No. 20-CA-4268. (R. pp. 145-154).[1] In its answer the Board has requested enforcement of its Order. (R. pp. 158-160). The Board's Decision and Order are reported at 168 NLRB 107.

The Petitioner, as an aggrieved person, invokes jurisdiction of this Court to review the Board's Decision and Order, and to deny enforcement of the Board's Order. This Court has jurisdiction of the proceeding under Section 10(f) of the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 160(f)[2], the events out of which this case arose having occurred in the State of California, within this judicial circuit.

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[1] References to the pleadings reproduced as "Volume I, Transcript of Record" are designated "R". References to portions of the stenographic transcript of the hearing before the Trial Examiner of the National Labor Relations Board reproduced as "Volume II, Transcript of Record" are designated "Tr."

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[2] Hereinafter referred to as the "Act".

STATEMENT OF THE CASE.

A. Statement of the Facts.

Electromec Design and Development Co., Inc., the Petitioner in this case (hereinafter referred to as "Electromec"), engages in subcontract production work for IBM, in addition to a number of other related activities. This production work is accomplished at the metal shop at Electromec's Santa Clara, California plant.

The employees discharged, Robert G. Saxer, Wilfred F. Gilbert, Dave J. Mooney, and Charles C. Pickelman, Jr. (hereinafter referred to by their last names), were employed on the IBM subcontract at the time of their discharge on October 10, 1966, as tool and die makers.

Where reference to individuals is made herein they will be referred to by their last names, after initial full name identification.

The Independent Craftsmen, Tool & Die Makers lost a Board supervised election at Electromec in February, 1966.

David Russell and James Bates were the only two men known to Electromec to have instituted the union election.

Russell voluntarily terminated his employment in the summer of 1966.

Bates was one of the men who walked off the job on October 8, 1966, was not discharged, and is still employed at Electromec.

Shortly before Easter of 1966, Pickelman requested a meeting with management regarding an additional paid holiday. He got the meeting and the men received Good Friday as an additional paid holiday.

In mid 1966, it was apparent to Electromec that tool and die makers were over qualified for the repetitive production work required by the particular subcontract on which the four discharged tool and die makers were employed.

Management made the decision at that time that since the tool and die makers had done a good job at Electromec they would not be terminated. However, no more tool and die makers would be hired as normal attrition occurred (such as the voluntary termination of Russell, a tool and die maker).

On September 21, 1966, a meeting with management occurred at the request of the employees of the metal shop. At that meeting five points were raised: (1) a 2 week paid vacation after 1 year of employment, (2) improved hospitalization, (3) sick leave, (4) modification of the rule requiring employees to work the day before and after a holiday to be eligible for holiday pay, (5) overtime pay for Saturday work.

Management responded to the five issues as follows: (1) a 2 week paid vacation would be granted after three years of employment, (2) Electromec was then engaged in improving hospitalization benefits, (3) Electromec did not have the large cost plus contracts of some major companies and simply could not afford sick leave, (4) Electromec's obligations to IBM re-

quired enforcement of the work before and after a holiday rule to avoid absenteeism, but a doctor's certificate for an absence would permit an employee to draw holiday pay, (5) the men were then drawing overtime pay for Friday; IBM required that the first day of the work week be Saturday.

Following the September 21st meeting there was no unrest among the employees that was apparent to management.

On Saturday morning, October 8, 1966, Saxer requested a raise in pay from Carl Porchein, the shop manager. The raise was refused. He then told Porschein he was terminating effective the following Friday.

At different times during the morning of October 8th, Saxer, Gilbert, Mooney and Pickelman asked for and received permission to take the afternoon off.

Electromec's policy was to permit a limited number of men to take off Saturday afternoon, recognizing that the men had been working long hours for some period of time, so long as the basic production schedule was not effected. Shortly before the normal lunch break time on October 8th, ten of the employees in the metal shop lined up at the time clock to punch out. When Carl Porschein asked what was going on the only response from one man was to the effect that he couldn't talk to him.

The ten men left the job. The IBM representative on the job contacted Fred A. Vasta, Vice President of Electromec. On Sunday, October 9th, telephone con-

tact with five of the men who had walked off the job was made. Each of them gave a different reason for leaving.

On Monday morning, October 10, 1966, three of the four tool and die makers who were discharged were called into a meeting with Electromec's President, Joseph P. Padgett, Jr. Mooney did not report for work at the regular time on that morning.

Just prior to the meeting, Padgett learned that Saxer had voluntarily terminated his employment effective the following Friday.

Padgett informed Saxer that his resignation was accepted, effective immediately, and that he would be paid through noon that day.

Padgett then asked Gilbert his reason for leaving the job on Saturday. Gilbert replied that his wife had high blood pressure and he felt that he should go home to check on her.

Padgett next asked Pickelman his reason for leaving and was informed that he was just tired and wanted the day off.

Padgett then informed the men that he was offering them an opportunity to express an honest opinion and reason for leaving, they had not done so and he was then terminating them.

The four men who had requested and received permission to take the afternoon off, Saxer, Gilbert, Mooney and Pickelman, were discharged on Monday, October 10, 1966.

At no time before, during, or after the walkout was Electromec given a reason for the men leaving the job.

The termination notices for the four men stated that their services as tool and die makers were no longer required.

The Board filed its charge on October 10, 1966.

After the case was at issue, on March 17, 1967, Electromec's counsel filed application to take the depositions of Saxer, Gilbert, Mooney and Pickelman. On March 27, 1967, the Division of Trial Examiners of the Board denied the application. The application was made in exact compliance with Section 102.34 of the Rules and Regulations of the Board as revised on January 1, 1965.

On April 4, 1967, when the case was called for hearing counsel for Electromec renewed the application to take depositions. This application was denied.

The case proceeded to hearing, was argued in writing by both sides, and submitted for decision.

On July 24, 1967, the Trial Examiner found that Electromec had not violated Section 8(a)(1) of the Act by discharging Saxer, Gilbert, Mooney or Pickelman and recommended that the complaint be dismissed in its entirety.

On December 8, 1967, the Board adopted the Trial Examiner's subsidiary findings but reversed the basic conclusion of law of the Trial Examiner and held that the discharges violated Section 8(a)(1) of the Act.

This petition for review of Decision and Order followed.

B. Questions Presented.

1. May the Division of Trial Examiners deny an employer the right to take the depositions of complaining employees when counsel has proceeded in precise compliance with the Board's own rules regarding depositions, to wit: Section 102.34 of the Rules and Regulations of the Board as revised on January 1, 1965?

2. Is an employer required to guess at the purpose of a concerted activity or do the employees have a duty to bring home to the employer the purpose of the walkout?

3. Assuming the walkout was a concerted activity, can the four discharged employees be treated legally as having participated in that activity when they had previously requested and been given permission to leave at the time that the walkout occurred.

4. Do employees have the right to walk out and return at their whim so as to interfere with the efficient operation of the employer's business during working hours?

5. Is an employer required to accept the precise terms of an employee's notice of termination, or may the employer act on the voluntary termination by effecting it at an earlier date?

6. In determining the issue of the employer's state of mind as to an allegedly discriminatory discharge should the Board consider the uncontradicted evidence of the good labor relations at the employer's place of

business, and the employer's refusal to retaliate against one of the men participating in the walkout who had previously instituted a union election?

7. Under all the facts and circumstances of this case has the employer violated Section 8(a)(1) of the Act in discharging Saxer, Gilbert, Mooney and Pickelman?

SPECIFICATION OF ERRORS.

1. The Division of Trial Examiners erred initially in denying discovery to Petitioner under Section 102.34 of the Rules and Regulations of the Board. The Trial Examiner erred in refusing Petitioner's application, at the commencement of trial, for discovery. The Board erred in finding no prejudicial error in the Division of Trial Examiners' and the Trial Examiner's rulings denying Petitioner the right to take depositions.

2. The Board erred in finding that the Petitioner knew or should have known that this was a protected concerted activity.

3. The Board erred in describing a walkout, occurring without notice, and without a stated purpose before, during, or after the occurrence as a "strike."

4. The Board erred in finding that the four discharged employees were entitled to the protection of the Act when they removed themselves as legal participants in the walkout by requesting and receiving permission to leave.

5. The Board erred in finding that Saxer's voluntary termination, accelerated by the employer, constituted a discriminatory discharge.

6. The Board erred in failing to consider the good labor relations of Petitioner and its lack of retaliation against Bates (who had been instrumental in an earlier union election) as evidence bearing on the employer's motive.

7. The findings of the Board with respect to questions of fact are not supported by substantial evidence on the record, considered as a whole.

8. The Board erred in reversing the decision of the Trial Examiner by finding that the walkout was a protected concerted activity.

9. The Board erred in finding that Petitioner had violated Section 8(a)(1) of the Act.

ARGUMENT.

I.

INTRODUCTION.

Petitioner has stated the facts essentially in chronological order as they occurred.

This argument is addressed to the questions presented and the errors committed essentially in the order of reference under "Questions Presented" and "Specification of Errors." No relative order of importance is intended, since a number of the issues and errors are inextricably intertwined. However, Petitioner considers the constitutional issue of denial of procedural due process of law to be of the utmost importance in this case.

The Trial Examiner found that there was no protected concerted activity because there was no protected purpose for the walkout. The Board rather summarily reversed the Trial Examiner on this point, hypothesizing its own reasons for the walkout. Obviously, this is a key issue in the case and will be discussed immediately after the due process issue.

Additionally, Petitioner believes that the uncontradicted evidence compels a holding that it has not violated Section 8(a)(1) of the Act on a number of other grounds which the Board did not see fit to pass upon in its Order and Decision.

The topical headings under the argument section of this brief are phrased differently but relate essentially

to the same points as "Questions Presented" and "Specification of Errors," although not necessarily in the precise order of the questions and errors previously enumerated.

The Board has misstated the evidence directly or by implication in certain instances. Those instances will be referred to herein as the argument requires.

Petitioner submitted a fifty-two page brief in opposition to the General Counsel's brief in support of exceptions. The length of Petitioner's brief to the Board was necessitated by the specification of twenty-three exceptions to the Trial Examiner's decision and a continuing distortion and misstatement of the facts by the General Counsel in that brief in support of exceptions.

Electromec is a company that has never before been involved in an unfair labor practice charge. Counsel for this company does not practice extensively in this field. Accordingly, the expectations of Petitioner and counsel may be somewhat naive. However, it does not seem unreasonable to Petitioner to expect at least some consideration of its legal position by the Board.

Having submitted a fifty-two page brief, it is somewhat disillusioning to find not one single reference in the Decision and Order to a case cited by Petitioner in its brief. A bare reference to the points raised by Petitioner would be some evidence that its position was at least considered by the Board. The Decision and Order is essentially bereft of such reference.

II.

THE DIVISION OF TRIAL EXAMINERS' REFUSAL TO PERMIT THE TAKING OF DEPOSITIONS AND THE REFUSAL OF THE TRIAL EXAMINER TO PERMIT THE TAKING OF DEPOSITIONS CONSTITUTED A DENIAL OF DUE PROCESS OF LAW TO PETITIONER.

Petitioner's application to take depositions (R. pp. 13-14) and the Division of Trial Examiner's denial of that application (R. p. 16) constitute the basic facts here. Petitioner renewed the application when the case was called for hearing and the Trial Examiner denied this application (Tr. p. 7, lines 10-20). Petitioner raised the constitutional issue in its written argument to the Trial Examiner. Since the Trial Examiner found that Petitioner had not violated the Act, the ruling regarding the application to take depositions was at that point academic. Petitioner's brief to the Board stated (R. p. 126) that the constitutional issue was not waived and included as Appendix IV a verbatim extract from its written argument to the Trial Examiner on this issue.

As with practically every other point raised by the Petitioner, the Board did not see fit, in its Decision and Order, to even make reference to this most important issue.

In the interest of brevity, and since Petitioner's argument to the Trial Examiner on this point is part of this record (R. pp. 143-144), Petitioner simply refers here to that part of the record.

Additionally, Petitioner cites *N.L.R.B. v. Globe Wireless Ltd.*, 193 F. 2d 748 (1951) at page 751, where the Court stated:

> "There is no provision in the Act authorizing the use of the discovery procedure."

The purpose in citing this decision is because of its specifically stated reason for denying discovery.

As of the date of Petitioner's application to take depositions the Board's own rules did include provisions for taking depositions and these provisions were followed precisely.

There is no good purpose to be served here (as was stated to the Trial Examiner) in belaboring this Court with countless authorities on the procedural due process issue. The issue is framed factually and legally as sharply in this case as it will ever be.

However, it is appropriate to examine the practical effect if depositions had been permitted in this case.

The key factual issue was what motivated the employees in walking off the job. If the depositions had been permitted, Electromec would then have had an opportunity to adduce the evidence which would have conclusively demonstrated that the men knew that Saxer had already voluntarily terminated and (as the Trial Examiner postulated (R. p. 29, lines 25-28)) it was then too late to support a wage demand. Electromec would have adduced the specific evidence that the men considered the issues raised at the September 21st meeting a closed issue, except for the increased

hospitalization benefits which were forthcoming. Electromec would have adduced the evidence that Saxer did not do all of the things he claimed, and which the Trial Examiner obviously did not credit (R. p. 28, lines 46-50). Electromec would have adduced the evidence that the other men in the shop did not know that their four "leaders" had already protected themselves by obtaining permission to leave early. Electromec would have adduced the evidence that, in all probability, the walkout was motivated purely and simply by a desire to retaliate against Porschein, inspired by an admitted malcontent. The Trial Examiner, in the absence of evidence which Electromec was effectively precluded from discovering, is again forced to hypothesize but it seems rather clear that this is the conclusion he reached as the trier of fact (R. p. 30, lines 2-11).

In addition to the absolutely basic constitutional issue here, it is clear that the refusal to permit discovery had very practical consequences. Given the opportunity to gather the evidence and present it, Electromec would have received the Trial Examiner's decision in most emphatic terms. It seems unlikely that the General Counsel would have excepted to his decision, and this case would not be before this Court now, adding its weight to an ever growing volume of petitions to review and enforce decisions and orders of the Board.

III

THE BOARD DISREGARDED THE EVIDENCE AND THE FINDINGS OF THE TRIAL EXAMINER IN FINDING A PROTECTED PURPOSE FOR THE WALKOUT.

The Trial Examiner, having heard the witnesses, specifically stated that even if Saxer's testimony (concerning getting "the guys in kind of an uproar") was true "management was unaware of any turmoil" after September 21 and before October 8, 1966 (R. p. 22, line 60). This inescapable conclusion was based in part on Porschein's testimony (Tr. p. 150, lines 16-19):

> Q. After the meeting in September with Mr. Padgett and up until the morning of October 8th, were you aware of any labor strike turmoil problems, anything of that nature?
>
> A. No.

Additionally, the Trial Examiner pointed out that "No one other than Saxer testified that he had talked to management about a wage increase in this period of time" (R. p. 22, lines 60-62).

Porschein was with the men on a continuing basis, and naturally the Trial Examiner would consider and refer to his testimony as being perhaps the most probative on the question of whether there was any turmoil in the shop between September 21 and October 8, 1966.

On the other hand the knowledge and motivation of Padgett, the President of this corporate Petitioner, is, of course, most relevant. Padgett's testimony on this point was as follows (Tr. p. 96, lines 3-11):

Q. (Mr. Hofvendahl) Between this date or these dates of these meetings, Mr. Padgett, and October 8, 1966, were you aware personally of any labor difficulties, problems or strikes in the metal shop?

A. No, I wasn't. I had the feeling myself that these men were waiting for me to get back with them. I told them I would, as soon as I had definite information on our insurance coverage, and costs, I would call them in and discuss it again.

It is almost inconceivable to Petitioner that the Board, acting as an appellate tribunal, can state in the face of this unequivocal evidence that "a preponderance of the evidence establishes that the walkout was a manifestation of the general dissatisfaction among machine shop personnel as to the failure of management to accede to their demands." (R. p. 145, lines 15-17).

Porschein testified (under cross-examination) that he had absolutely no idea why the men walked off the job, but in retrospect he concluded that it was probably because they were mad at him for not giving Saxer a raise (Tr. p. 170, lines 23-25; p. 171, lines 1-25):

Q. You have testified that you had no idea why the employees left work on Saturday, October 8th?

A. At the time they left, no, sir.

Q. When did you get an indication? When did you think you knew why they left?

A. Well, after everything happened, after Monday, I certainly had to look back and try and figure out what had happened, and in the ensuing weeks I talked to other people.

Q. What was your conclusion?

A. The only thing I could conclude, the only contact I had with a man was Bob Saxer that morning as far as one of my employees or anyone having any reason.

Q. What was your conclusion why they walked off?

A. That they were mad at me because I was late in letting Bob go.

TRIAL EXAMINER: Late in letting him go? I don't quite understand.

THE WITNESS: He had requested a raise and I had told him no, not in the immediate future, and he said he was going to quit, and I didn't make him stay, by any means.

Q. (By Mr. Friedman) So you feel that they were walking off because Bob Saxer didn't get his raise?

A. I don't know, but that is the only thing I could assume could be the reason. I had no other contact, personnel contact with any of the people, during that day.

Q. Would you read this sentence from your affidavit?

A. "I feel they were walking off because I did not give Saxer a raise he asked for."

As the Trial Examiner pointed out (R. p. 30, lines 4-11), concerted activity which is motivated by a desire to retaliate against a supervisor or embarrass an employer is not the type of activity which deserves the protection of the Act.

The Board's Decision and Order states that "On October 8, when the futility of their efforts was again

demonstrated by the denial of a wage increase to their spokesman Saxer, they elected to walk out." (R. p. 149, lines 24-26). As the Board's own Decision and Order demonstrates (R. p. 146), increased wages formed no part of the five points presented to management at the September 21st meeting. Yet, by implication, the Board infers that the October 8th refusal to raise Saxer's wages is directly related to the September 21st meeting. The Board finds significance in the fact that the "walkout occurred on a Saturday, Respondent's failure to provide overtime pay for Saturday work had been one of the major complaints pressed, without success, by the employees" (R. p. 149, lines 27-29). The clear implication here is that these employees were being forced to work a six day week without overtime.

Padgett testified directly and unequivocally that IBM, for who the work was performed, required that Saturday be the first day of the work week (Tr. p. 94, lines 23-25; p. 95, lines 1-12):

> Q. Was there a discussion about time and a half on Saturday?
>
> A. Yes, we discussed time and a half on Saturday and I outlined to them that our work week had to conform to our client's work week and that their work week was their Saturday to Friday and the client was IBM and they felt that they had more flexibility in the work week of this nature, and whether they offered us any explanation or not of why they had this, we said we would abide by that work week.

> Q. Did you also point out that the men were getting time and a half for Friday?
>
> A. Yes, time and a half, anything in excess of eight hours in any one day, also time and a half for Friday, also anything over 40 hours. I think at that time I elaborated to the point that if a holiday fell within the work week it was not a 40-hour week, a 40-hour work week, but a 32-hour work week.

It is assumed that not even the Board requires Electromec to pay their employees time and a half after four days. Certainly it is less than fair to this Petitioner to disregard the evidence and distort the record in this manner.

It seems to Petitioner that perhaps the most succinct and basic explanation of what occurred here is provided by the Trial Examiner's quotation of a portion of Porschein's testimony (R. p. 27, lines 23-24) to wit: "Well, Dave, we can't have everyone going home at noon every time somebody quits."

The Trial Examiner cited *N.L.R.B. v. Ford Radio & Mica Corporation,* 258 F. 2d 457 (1958) at page 465 (R. p. 29, lines 45-49) as follows:

> "However, where the employer from the facts in its possession could reasonably infer that the employees in question are engaging in unprotected activity, justice and equity require that the employees, if they chose (sic) to remain silent, bear the risk of being discharged."

Certainly, justice and equity compels a decision in this case that Electromec has not violated Section 8(a)(1) of the Act.

Included in the rather limited number of authorities cited in the Decision and Order is *Indiana Gear Works v. N.L.R.B.*, 371 F. 2d 273 (1967) wherein the Court reversed the Board's finding that the employer had been guilty of a discriminatory discharge. The Court, at page 275, quotes the language of a Supreme Court decision which is particularly relevant to the course of this proceeding as follows:

> "In a case like this where the Board has brushed aside the findings of the Trial Examiner, it is well to again consider the teachings of the landmark case of *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456. The decision in that case has been quoted often in cases where the facts are somewhat similar to those in the case at bar.
>
> In *Universal Camera*, the Supreme Court stated that the findings of the Labor Board must be supported by substantial evidence on the record considered as a whole; that the findings of the Trial Examiner are a part of that record; and that evidence supporting a conclusion may be less substantial when an experienced Examiner, reaches a conclusion contrary to that reached by the Board, and that this is particularly true when the credibility of witnesses is involved."

It is submitted that the Trial Examiner's finding that the walkout was not a protected concerted activity is supported by substantial evidence on the record, considered as a whole, and the Board's reversal of this finding is not so supported.

IV.

SAXER, GILBERT, MOONEY AND PICKELMAN REMOVED THEMSELVES FROM THE PROTECTION OF THE ACT BY REQUESTING AND RECEIVING PERMISSION TO LEAVE AT NOON ON OCTOBER 8, 1966.

At various times during the morning of Saturday, October 8, 1966, the four discharged employees requested and received permission to take the afternoon off. As the Trial Examiner pointed out in his Decision (R. p. 24, lines 10-18), Petitioner's policy in this connection was reasonable.

The evidence is uncontradicted that the four men received permission to leave early. The evidence is equally uncontradicted that they were part of the group who punched out at the same time.

It is Petitioner's position that the permission granted did have a legal effect as far as these particular individuals were concerned. Briefly stated, how could these four men be engaged in concerted activity against Electromec by doing the very same thing they had permission to do?

Petitioner can understand the Trial Examiner's comments in this connection, and clearly is not urging a mere quibble on this Court.

On the morning that the men were discharged, when two of them repeated their ostensible reasons for taking the afternoon off, Padgett told them clearly, "I am

offering you men the opportunity to express an honest opinion and reason for leaving. These reasons do not hold water as far as I am concerned. It is my decision to terminate you immediately." (Tr. p. 102, lines 16-19). This evidence is clear and uncontradicted, and neither the employees nor employer were then being advised by counsel.

The distinction should be clearly drawn between Padgett's factual response to the walkout, and counsel's analysis of the legal effect of the permission to leave.

It was very clear to Padgett that these four men had participated in a disruption of the production schedule in the metal shop. It was equally clear that they had not given management their true reasons (whatever they were) before, during, or at any time after the walkout, including this one last opportunity.

Certainly Electromec is not required to continue the employment of men who are dishonest with the company and dishonest with their fellow employees. Since these four men were also tool and die makers, overpaid for the work they were doing, continued on the payroll by Padgett's decision in recognizing the good job they had previously done, this was stated as the reason for their termination. This stated reason for termination was fairer to them than they deserved, and was definitely a factor in the decision to discharge them.

The Board's Decision and Order (R. p. 151, footnote 6) refers to the fact that Petitioner no longer required the higher skills of tool and die makers. The footnote

would have been replaced only as normal attrition occurred. The facts were presented by Electromec at the hearing and not as the Board implies in its Decision and Order.

The argument under this topical heading is a rather graphic illustration of the observation previously made that many of these points are inextricably intertwind.

The Trial Examiner did not agree with Electromec's position on this point of these four men being severed from the concerted activity, but at least he stated his reasons for disagreement. The Board simply attached "no significance" to his finding in that regard (R. p. 147, p. 147, footnote 2).

As far as Petitioner has been able to determine this is a case of first impression on this point.

For the convenience of this Court, Petitioner will repeat a portion of its brief to the Board, in a somewhat shortened form, dealing with this issue.

As to Saxer, Gilbert, Mooney and Pickelman, it is most emphatically urged that these particular men cannot have it both ways. If they requested permission to take off, respectively, because "I felt like going home" (Saxer, Tr. p. 23, lines 18-20), "to check on my wife" (Gilbert, Tr. p. 67, line 10), to "go home after five hours of work" (Mooney, Tr. p. 54, line 4), "I just asked him if it would be all right" (Pickelman, Tr. p. 43, lines 9-10), they certainly were not taking part in concerted action.

By receiving permission they effectively separated themselves from the other men in the metal shop. If there was legally concerted action here, it was not participated in by these men who had management's permission to leave.

The balance of the men in the metal shop were not terminated and these were the only men, on the basis of this record, who could contend that they were participating in concerted action.

With reference to the Trial Examiner's statement (R. p. 27, lines 46-55; p, 28, lines 1-4), obviously each of these four men affirmatively requested permission to leave. Therefore, Electromec certainly practiced no deception on these men and clearly did not lead them to leave early. These were their own acts. Purely as a factual hypothesis, Electromec disagrees with the Trial Examiner's analysis.

On the basis of their own testimony, they did agree with the other men to walk out. However, these four did something the others did not do. They asked and received permission from management to leave early. As the Trial Examiner stated in the Decision (R. p. 24, lines 14-18), "It is also apparent that the Respondent probably would not have found fault if only three of the employees had gone home early."

As of that point, in time, these four men apparently believed they really had things under conrtol. They were going to walk out to wake up or shake up management (without of course telling management why).

However, these "leaders" did not have the fortitude to tell management about their alleged grievances, and they did not have the honesty to tell their fellow workers they had permission to leave, or to tell the company what was actually happening.

It does indeed seem to Electromec that they cannot have it both ways. If they received permission to leave, this placed them in a particular position under the Act based on their own affirmative conduct in seeking that permission. If the walkout was concerted activity, but they were relying on the permission granted to leave early they were not walking out, they were leaving with the permission of management. Therefore, these four men simply were not *legally* a part of the concerted activity.

Electromec again reiterates that as of October 10, 1966, management was well satisfied that these men were not playing fair either with the company or their fellow employees. However, this legal argument is not a mere legalistic exercise. These four men were the ones who affirmatively placed themselves in the position of having permission to leave. Having placed themselves in that position, it is submitted that they cannot be held to have participated in concerted action consisting of a group leaving work early.

V.

THE WALKOUT WAS NOT A STRIKE; IT WAS AN INTERFERENCE WITH THE EFFICIENT OPERATION OF PETITIONER'S BUSINESS AND CONSTITUTED IN AND OF ITSELF CAUSE FOR DISCHARGE.

This point was covered in detail in the written argument to the Trial Examiner. Since the Trial Examiner found no protected purpose for the walkout, he found that Electromec "discharged the four men for engaging in unprotected concerted activity." (R. p. 31, lines 1-2). Petitioner concludes that since the Trial Examiner recommended dismissal of the complaint in its entirety he did not deem it necessary to deal with this issue precisely in the form presented by Petitioner in its written argument.

In its brief to the Board, Petitioner stated (R. p. 126) that it was not waiving the issue of non-protection of activities during working hours which disturbed the efficient operation of the employer's business. However, the written argument to the Trial Examiner was included in the brief as Appendix III (in the same manner that the due process issue was included as Appendix IV). Certainly if the Board had followed the Trial Examiner's recommendation, there would have been no necessity to refer to this point in the Decision and Order.

However, when the Board disregards the Trial Examiner's recommendation, Petitioner believes that it is entitled to at least some slight indication that this

basic substantive defense has been in some manner considered by the Board.

Petitioner quoted a portion of its written argument to the Trial Examiner in its brief to the Board (R. p. 105, lines 12-21):

> "Without the benefit of discovery Electromec did not know until the trial what actually went on in the metal shop on Saturday morning, October 8, 1966. There is no reason to doubt the testimony of the witnesses in this connection, and it would be an insult to the intelligence of the Trial Examiner to contend that the walkout was not a concerted activity."

Clearly, as demonstrated by the excerpt from the written argument to the Trial Examiner quoted above, it would be an insult to the intelligence of the Trial Examiner to contend that this was not concerted activity, and Electromec has never so contended. Electromec contended at the hearing, contended in its brief to the Board, and contends most emphatically now that the walkout was unprotected.

The Board's citation of *Radio Station KPOL, 166 CCH N.L.R.B.*, 21, 644 (1967) illustrates this issue precisely. The Board's apparent reason for citing that case was in connection with the employer's stated reason for discharges, etc. The facts were that five employers were discharged three days after they went out on strike, and the Board quite properly held this to be a discriminatory discharge. The point in the case at bar is that these men did not strike and this was not a concerted activity such as the Septem-

ber 21st meeting with management. This was an unprotected, unexplained interference with the efficient operation of Petitioner's business during working hours.

Petitioner considers this to be one of the most important substantive issues in this case. The following is verbatim from Appendix III of Petitioner's brief to the Board.

The law is well settled that the National Labor Relations Act does not protect activities during working hours which disturb the efficient operation of the employer's business.

There are a multitude of decisions on this point but Electromec will cite only three cases. These are factually close to the case at bar, are fairly recent decisions, and illustrate particular points at issue here.

Cleaver-Brooks Mfg. Corporation, Petitioner v. National Labor Relations Board (1959) 264 F. 2d 637;

American Art Clay Company, Inc., Petitioner v. National Labor Relations Board (1964) 328 F. 2d 88;

National Labor Relations Board, Petitioner v. Blades, (1965) 344 F. 2d 998.

In *Cleaver-Brooks* the Board found that four discharged men (the same number involved in this case) engaged in a protected concerted activity which consisted of a work stoppage of about 20 to 25 minutes protesting the appointment of a new foreman. The Court set aside the Board's order.

These four men were part of a group of fifteen participating in the work stoppage. All of the men returned to work (just as all of the men reported to work at Electromec, Monday morning after a much more serious work stoppage).

In both this case and *American Art Clay*, one of the issues was whether the selection of a foreman was subject to concerted activity by employees. The general principle, subject to an exception discussed on page 90 of *American Art Clay*, is that it is not. Electromec recognizes this legal distinction from the case at bar.

However, in *Cleaver-Brooks* the Company, in deciding to lay off some men, selected these particular four because of their participation in the work stoppage and their attitude. This illustrates the fact that an employer may have more than one reason for discharging a man. In Electromec's case, these four tool and die makers had been retained on the payroll despite the fact that they were overqualified for the work. When they participated (as demonstrated by their own testimony) in an unprotected concerted activity there is no legal reason why Electromec cannot select them for termination, first, because of their participation in the disturbance of the efficient operation of the employer's business, and, second, because they were not needed as tool and die makers.

The case is cited for the close factual parallel to this case, and the emphatic statement at page 640:

> "The Act does not protect activities during working hours which disturb the efficient operation of the Company's business. *Caterpillar Tractor Co. v. N.L.R.B.*, 7 Cir., 1956, 230 F. 2d 357."

American Art Clay involved a walkout shortly before the noon hour just as in this case. Eventually issue was joined on whether the discharge of some of the men who had walked out constituted an unfair labor practice. The Board's order requesting enforcement was denied.

One of the principal legal issues involved was whether the employees had the right to engage in concerted activity over the selection of a foreman. This is the same legal distinction in *Cleaver-Brooks* previously acknowledged herein.

Again in this case the Court recognized the distinction between protected activity and unprotected activity, stating at pages 90 and 91.

> "Prior to the date of its decision in *Dobbs Houses, Inc.*, the Board had recognized the distinction between moderate conduct as a protected activity on one hand and intemperate activities during working hours which destroy the efficient operation of an employer's business, on the other. *Ace Handle Corp.* (1952), 100 *N.L.R.B.* 1279; *Wood Parts, Inc.* (1952), 101 *N.L.R.B.* 445; *Hearst Publishing Company, Inc.* (1955), 113 *N.L.R.B.* 384. In none of those cases was there a strike or walkout."

However, there were some highly relevant factors in *American Art Clay* which made that case a much stronger one for enforcing the Board's order (which the Court refused to do) than the instant case.

The facts in *American Art Clay* were clear that one Joe Songer stated to the assistant plant superintendent, with all of the employees assembled, that if the change in foreman was because the Company wanted more production, then the men wanted more money. There was some evidence that some employees cried out, "That's right, we're with Joe."

The majority of the Court found that "There is no evidence that Joe Songer had received any authority from the other employees to speak in their behalf." The dissenting Judge disagreed with the majority's view of the reason for the walkout, but took no exception to this statement concerning Songer's lack of authority.

Thus, in the instant case, as of the September 21st meeting, Saxer was apparently recognized as a spokesman by both management and the employees. However, there is not a scrap of evidence that there was any such spokesman as of October 8, 1966, because, indeed, no one of these men troubled themselves to inform Electromec as to why they were walking out. If by some process of inference it is found that Saxer was some sort of spokesman on October 8th he spoke for himself alone. By his own testimony he asked for a raise and when he didn't get it he voluntarily terminated his employment.

American Art Clay discusses *N.L.R.B v. Phoenix Mut. Life Insurance Co.*, 167 F. 2d 983, at some length. In *Phoenix*, several insurance salesmen drafted a letter to management concerning the selection of a cashier. The company discharged the two salesmen

principally involved, the Board ordered their reinstatement, and the Court affirmed.

In discussing *Phoenix*, at page 90, the Court states:

> "In *Phoenix* there was no walkout or strike. We emphasized the moderate conduct of the salesmen. We stated, 167 F. 2d at page 988: '***Conceding they had no authority to appoint a new cashier or even recommend anyone for the appointment, they had a legitimate interest in acting concertedly in making known their views to management without being discharged for that interest. The moderate conduct of Davis and Johnson and the others bore a reasonable relation to conditions of their employment.' "

The conduct of the salesmen in *Phoenix* is a direct parallel to the moderate conduct of the metal shop employees at Electromec in requesting the meeting of September 21st.

The conduct of Electromec in responding, by explanation and improved hospitalization, to the views of the employees is in sharp contrast to the conduct of the employer in *Phoenix* who promptly discharged two men who wrote a letter.

If this record discloses a certain disenchantment on the part of Electromec's management with the four men here involved, the reasons are more than apparent.

Blades Manufacturing Corporation was principally concerned with the effect of the Company's conduct prior to an election, and the effect of a second election which the union won. The Court reversed the Board, held the first election valid, and found that the Company was under no duty to recognize the union.

The Court, having found that there was no union representing the employees, then addressed itself to the question of whether the employees were engaged in a protected concerted activity. Commencing at page 1004 and to the conclusion of the opinion the Court emphatically reaffirms the same principle heretofore discussed.

The walkouts in *Blades Manufacturing Corporation* were more numerous than the walkout at Electromec, which in turn was more serious than the twenty-five minute walkout in *American Art Clay* which produced the immediate discharge of the employees.

However, the principle in each case is precisely the same. At page 1005 of *Blades Manufacturing Corporation* the Court refers to the Supreme Court's view of this issue and states:

> "And in *National Labor Relations Board v. Insurance Agents*, 361 U.S. 477, 80 S. Ct. 419, 4 L. Ed. 2d 454 (1960), the Supreme Court agreed, on the basis of its *Briggs-Stratton* rationale, with the Board's argument there that a total strike is a concerted activity protected against employer interference by §§ 7 and 8(a)(1). But deliberate 'slowdowns' and 'walkouts' by the employees to exert pressure on the employer to accept the union's bargaining demands were unprotected concerted activities, and the employer was free to discharge the participating employees for their unlawful disloyal tactics."

If the quoted language from the decision of the Supreme Court means what it clearly appears to mean, the Board's Order should be denied enforcement on this ground alone.

VI.

PETITIONER IS NOT REQUIRED TO ACCEPT SAXER'S VOLUNTARY TERMINATION ON HIS TERMS, BUT MAY ACCELERATE THE VOLUNTARY TERMINATION.

The Trial Examiner found that Electromec's acceptance of Saxer's resignation as of Monday, October 10, 1966, rather than as of Friday, October 14th, was "in effect" a discharge (R. p. 31, footnote 20). The Board used the same phrase in finding that Saxer's accelerated termination was "in effect" an unlawful discharge (R. p. 148, footnote 3).

It seems to Petitioner that the position of Saxer vis a vis the other three tool and die men is so identical to theirs that the additional fact that Saxer had voluntarily resigned is not of monumental importance to the decision in this case.

However, as of the meeting on the morning of October 10th, Padgett was clearly operating under a good faith belief that an employer can accept an employee's notice of termination at the employer's option without violating any law.

There are a number of possible factual circumstances that occur to Petitioner in this connection. If Saxer had given an inordinately long notice as to his selected termination date; if he had given his notice and then simply slacked off on his work; or if, within the actual notice period, Electromec had the opportunity to replace him with a machinist—it is Petitioner's

understanding that it may select its own termination date. Obviously, and as previously covered in detail herein, it is Petitioner's contention that the effective date for Saxer's termination was accelerated for cause.

No authorities have been found on this point and none were cited by either the Trial Examiner or the Board.

However, it does seem quite clear to Petitioner that his act of voluntary resignation was one additional factor as far as Saxer was concerned. It is submitted that Electromec cannot be guilty of a discriminatory discharge in effectuating the termination of an employee three days earlier than the employee's stated notice.

VII.

LABOR RELATIONS AT ELECTROMEC WERE GOOD AND THERE WAS NO NECESSITY FOR THESE MEN TO DISRUPT PRODUCTION.

Petitioner acknowledges the basic holding of *N.L.R.B. v. Burnup & Sims*, 379 U.S. 21, 13 L. Ed. 1 (1964), cited by the Board, wherein the Supreme Court determined that the employer's motivation was immaterial if a discharged employee was acting in a protected activity.

While Petitioner might prefer the logic of Justice Holan's concurring and dissenting opinion, the majority opinion apparently represents the present state of the law on this point.

In this context, then, the history of labor relations at Electromec may not be highly relevant to a determination of this cause. It is submitted, however, that the general course of conduct of this employer in dealing with its employees does have some probative value in resolving these complex and interrelated issues.

As the Trial Examiner said (R. p. 30, lines 13-17), "I find it difficult to believe that the walkout was an expression of interest in mutual aid or protection. Never before had any of the dischargees failed to speak up for changes in working conditions when they felt it in the interests of the employees to do so, least of all Saxer."

Petitioner, of course, recognizes the duty of the Regional Director of the Board to investigate any

complaint made to it. However, the operative facts here were that the office which undertook the investigation of this complaint was the same office which supervised the election for The Independent Craftsmen, Tool & Die Makers. The personnel of that office knew that Bates was one of the moving parties in obtaining that election. In the course of the investigation of the case at bar it was immediately apparent that Bates was one of the employees participating in the walkout and he was not discharged. This fact alone should have been an immediate and striking indication that this employer was not motivated by an anti-union or anti-employee bias.

The non-legal investigating personnel determined that this was obviously concerted action, and perhaps understandably did not draw the legal distinction between protected and non-protected concerted activities. However, when an experienced Trial Examiner makes the statement quoted above and recommends dismissal of the complaint in its entirety, it is submitted that the least the Board should do is consider the history and background of this particular employer before summarily disregarding the recommendation of its Trial Examiner.

The fact that the union lost a Board supervised election in February, 1966, certainly has some probative value to establish the fact that the employees were satisfied with conditions at Electromec.

Pickelman testified that he and at least one other man requested a meeting with management regarding

an Easter holiday. They got the meeting and they got the holiday. (Tr. p. 91, lines 3-19).

The five points brought up at the September 21st meeting were as follows:

1. The first day of the work week.

2. Working the day before and the day after a holiday in order to receive holiday pay.

3. Two weeks vacation with pay after one year.

4. Sick leave.

5. Increased hospitalization benefits.

The first two points are clearly prerogatives of management, but were courteously discussed with the employees. The client, IBM, required the first day of the work week to be Saturday. Management had to require that the men work the day before and the day after a holiday to avoid a high incidence of long holiday weekends interfering with production schedules. Even on this point, however, the men were told that if they produced a physician's certificate which showed a bona fide illness on the day before or the day after a holiday they would receive the holiday pay.

They were informed that two weeks vacation with pay after one year was not in the cards. They would receive two weeks vacation with pay after three years, but the Company would not object if any employee wished to take more than one week on his own time.

They were informed that Electromec did not have the large cost plus government contracts such as Lock-

heed had, for example, and simply could not afford sick leave at that time.

It was agreed that increased hospitalization benefits would be obtained, and this has since been accomplished.

When these men came to work at Electromec they either fixed their own rate of pay, in an amount satisfactory to them, by express agreement, or did so by implication by going to work at a fixed rate. Every one of them received substantial increases in relatively short periods. Mooney was increased one dollar per hour in one year.

Even when management at Electromec finally recognized that tool and die men were not required, or desirable from the Company point of view, they were not terminated. The decision was that the men would not be laid off, but would be replaced by machinists as normal turnover occurred.

At the expense of efficiency the shop manager, Porschein, specifically directed that the work would be rotated among the tool and die men to make it more interesting for them. (Tr. p. 152, lines 5-15).

There is not the slightest suggestion here that this Company did anything but consider the welfare of its employees.

Despite the holding of the Supreme Court in *Burnup & Sims* in 1964, a 1965 decision of the Board, *Invalex Sales Co., Inc.*, 152 *CCH N.L.R.B.* 9354 (1965) holds:

> "The discharge, however, was caused by the unauthorized departure from the plant, and was not motivated by any union or other protected activity of Amos."

It is apparent that the motivation of the employer is indeed a factor which continues to be relevant in these cases. The background of Electromec was fully known to the Regional Director, was fully developed before the Trial Examiner, reported verbatim, and covered in detail in his decision. It is submitted that the Board should have given some weight to this evidence, a part of the record as a whole, and adopted the recommendation of the Trial Examiner to dismiss this case in its entirety.

CONCLUSION.

In addition to the misstatements by implication in the Decision and Order previously set out, there were specific misstatements of fact in the Decision and Order.

The Board states (R. p. 147, lines 2-3), "Saxer asked for a meeting with higher management. When Porschein failed to schedule a meeting . . . . ." The direct testimony of Porschein in this connection (Tr. p. 148, lines 23-25; p. 149, lines 1-2) is as follows:

> Q. Did the men in September, 1966, request the meeting with Mr. Padgett to you?
>
> A. Yes.
>
> Q. Did you arrange for that meeting?
>
> A. Yes, I believe I did.

The direct testimony of Saxer in this connection (Tr. p. 17, lines 6-11) is as follows:

> Q. After you spoke to Mr. Porschein about the meeting, what did you do?
>
> A. I went back and told the group of people I worked with that he would set up a meeting.
>
> Q. When was this meeting set up for?
>
> A. The 21st of September.

The Board states (R. p. 147, lines 23-24), "Padgett, Respondent's president, learned of the walkout on Saturday evening . . . . ."

The Trial Examiner stated in his decision (R. p. 24, lines 47-49), "Then, returning Walsh's call, Vasta

learned of the walkout and attempted to reach Padgett but was unsuccessful until Sunday, October 9."

The direct testimony of Vasta in this connection (Tr. p. 207, lines 15-19) is as follows:

> Q. Were you able or did you do anything in connection with this problem on that day, Saturday?
>
> A. Yes, I tried to contact Mr. Padgett who was out of town. I learned from Mrs. Padgett that he couldn't be reached until the next morning, which was Sunday morning.

The Board states (R. p. 150, lines 19-21), "Respondent at all times was fully aware of the continuing unsatisfied demands emanating from workers in the machine shop."

The direct and unequivocal evidence contradicting this statement in the Decision and Order has been previously set out under topical heading III of this argument, but will be repeated here.

As to the shop manager, Porschein, who had the most direct and continuing contact with the men (Tr. p. 150, lines 16-19):

> Q. After the meeting in September with Mr. Padgett and up until the morning of October 8th, were you aware of any labor strike turmoil problems, anything of that nature?
>
> A. No.

As to the president, Padgett, whose understanding is the most relevant as to any issue bearing on the knowledge of Petitioner (Tr. p. 96, lines 3-11):

> Q. (Mr. Hofvendahl) Between this date or these dates of these meetings, Mr. Padgett, and October 8, 1966, were you aware personally of any labor strike difficulties, problems or strikes in the metal shop?
>
> A. No, I wasn't. I had the feeling myself that these men were waiting for me to get back with them. I told them I would, as soon as I had definite information on our insurance coverage, and costs, I would call them in and discuss it again.

Petitioner, perhaps ingenuously, believed that the Board acted in effect as an appellate tribunal in reviewing the Trial Examiner's decision. The misstatements by implication and the specific misstatements set out do not have an overwhelming significance in the entire context of this case. However, they serve to convince Petitioner that this record was either hurriedly considered by the Board, or deliberately misconstrued against the interests of Petitioner. In either event Electromec did not obtain the fair and impartial consideration of its case to which it is entitled as a matter of justice and law.

Petitioner has previously recognized the complexity and interlinking of the issues here.

Its major contentions may be summarized as follows:

1. Petitioner was denied due process of law in the refusal to permit the taking of depositions in accordance with the precise Rules and Regulations of the Board.

2. There was no protected purpose for the walkout as the Trial Examiner found.

3. The four discharged employees were not part of the concerted activity because they had received permission to do the very thing of which the concerted activity consisted.

4. The walkout and return on Monday morning was neither a strike, nor was it moderate concerted activity protected by the Act. It was a non-protected activity which interfered with the efficient operation of the employer's business.

For the foregoing reasons, the Decision and Order of the National Labor Relations Board should be reversed and vacated, and its Cross-Petition for Enforcement denied.

Respectfully submitted,

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Certificate of Attorney

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

R. L. Hofvendahl